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No. 212

In the Supreme Court of the United States

OCTOBER TERM 1960

MOSES LAKE HOMES, INC., LARSONAIRE HOMES, INC. and LARSON HEIGHTS, INC.

Petitioners,

vs.

GRANT COUNTY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

LYCETTE, DIAMOND & SYLVESTER
AND LYLE L. IVERSEN
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FRAYN LETTERPRESS

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INDEX

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THE ISSUE IN THIS CASE IS WHETHER THE FEDERAL COURT WILL LEND ITS ASSISTANCE TO ENFORCE A DISCRIMINATORY TAX EXACTION

Both the trial court and the Circuit Court of Appeals have found specifically that the State of Washington has undertaken to tax the leasehold on a different and higher basis than the amount of taxes and assessments on other similar property of similar value. (R. 155, R. 355). This court in *Comstock v. International Investors,* 335 U. S. 211, held such findings virtually conclusive, saying:

> "A seasoned and wise rule of this court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

To the same effect see *Corn Products Refining Co. v. Commissioner,* 350 U. S. 46, 51, 100 L. Ed. 29. Respondent undertakes, on page 6 of its brief, to say that the mortgage encumbrances must have been considered, contrary to the opinion of the Circuit Court. This is the first time that contention has been advanced and it is contrary to respondent's own statement made in response to a request for admission. This matter was before the court upon the facts stipulated and admitted. Petitioner, by its request for admission 13, (R. 102) asked respondent to admit as follows:

> "The assessor for Grant County, in fixing the assessed values of the properties herein, based his evaluations upon 50% of the market value of the physical improvements on the respective properties held by the respective defendants herein, without reference to the market value of the leaseholds of the respective defendants, and without reference to mortgage encumbrances against leaseholds."

Respondent's answer to that request for admissions is as follows (R. 141):

> "VIII.
>
> "As to item No. 13, the assessor admits that the assessed valuations were made without reference to the mortgage encumbrances, but that the valuation was fixed in considering a similar ratio of similar properties assessed within Grant County, taking into consideration the other items which would affect the value of the property."

There can be no doubt from the evidence that the burdens against the property were not considered. The Washington Statute, § 84.40.030, of the Revised Code of Washington, provides:

> "Taxable leasehold estates shall be valued at such price as they would bring at a fair voluntary sale for cash."

At no time has it been contended that the State was undertaking to tax this leasehold on any basis other than on the value of the physical improvements. That is the basis the Supreme Court of Washington said that Wherry Act leaseholds were to be taxed, in *Moses Lake Homes, Inc. vs. Grant County,* 51 Wn. (2d), 285, 317 P.(2d) 1069. The formula for taxing all other leaseholds, which was announced by the Washington Supreme Court repeatedly, is that for taxation purposes leaseholds must be measured by their market value, considered in the light of their burdens and benefits. *Metropolitan Building Co. vs. King County,* 72 Wash. 47, 129 Pac. 883; *Metropolitan Building Co. vs. King County,* 62 Wash. 409, 113 Pac. 1114; *Metropolitan Building Co. vs. King County,* 64 Wash. 615, 117 Pac. 495; 258 Pac. 473, affirmed, *Bellingham Commercial Hotel Co. v. Whatcom County,* 190 Wash. 609, 613, 70 P.(2d) 301; *Dexter Horton Bldg. Co. v. King County,* 10 Wn. (2d) 186, 116 P.(2d) 507. Here neither the cash market value of a *leasehold* nor burdens and benefits were considered.

Respondent, on page 7 of its brief, makes an excursion outside of the record to say that the action brought with respect to taxes assessed in 1952 became a final judgment against petitioner and that petitioner had paid these very taxes. This statement outside of the record is not correct, and omits

the fact that the action was terminated by compromise by which the county agreed thereafter to tax only the market value of the leasehold and kept its promise only through the following year with respect to taxes assessed in 1953 for 1954, which taxes were levied and paid on the same basis as other leaseholds are taxed in the state and not upon the basis sought to be applied here.

The case of *Moses Lake Homes, Inc. vs. Grant County,* 51 Wn. (2d) 285, 317 P.(2d) 1069, does not deal with any specific taxes in any particular amounts and it was merely declaratory of what the Supreme Court of Washington held to be the applicable principle of law, and that was that a Wherry Act leasehold would be taxed at the full value of the improvements on the property. The court left no room for the application of the burdens and benefits formula which it has consistently applied in cases involving leases from the state, and left no room for the ascertainment of the cash market value of the leasehold, as such. Thus, the Supreme Court of Washington apparently indicated that the statute with respect to the method of taxing leaseholds, R.C.W. 84.40.030, was applicable only to other leaseholds than Wherry Act leaseholds.

In the case of *Metropolitan Building Co. vs. King County,* 62 Wash. 409, the Washington Supreme Court expressly rejected the idea that a leasehold could be assessed upon the value of the improvements, in a case involving a lease from the state. The court said on page 412:

> "Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous and entitles respondent to relief."

Thus, the identical matter which the Washington Supreme Court, in the case of *Moses Lake Homes vs. Grant County,* 51 Wn. (2d) 285, 317 P.(2d) 1069, held with respect to a Wherry Act leasehold to be the basis of the assessment had been held not to be the basis for an assessment with respect to leaseholds from the state. The same case, *Metropolitan Building Co. vs. King County,* 62 Wash. 409, 113 Pac. 1114, also answers another point raised in respondent's brief, with respect to whether the court can set aside a tax that is levied on a wrong basis. The court there said:

> ". . . Where there is no basis in law for the assessment, courts have always stood ready to correct the wrong. It is fundamental that the powers to tax can only be exercised under statute defining its limitations; and if the law be not followed, the owner is not to be left without remedy."

In this case, the law of the state has been declared by the state Supreme Court to be such that the assessor had no choice except to apply the law and to assess a Wherry Act leasehold without reference to its burdens and benefits and without reference to the market value of the leasehold as such, but solely by determining the value of the physical improvements. That is precisely what the Washington Supreme Court in the *Metropolitan Building Co.* case above cited had held could not be done with respect to other leaseholds. This interpretation of the Washington law made unavailing any administrative proceedings to correct the discriminatory actions of the assessor who merely applied the law as declared by the Washington Supreme Court.

In the case of *Metropolitan Building Co. vs. King County,* 64 Wash. 615, 117 Pac. 495, the Washington

Supreme Court pointed out that in determining the valuation of a leasehold, the current income and prospects of the leasehold as an investment were prime considerations in taxing the leasehold at the price that it would bring at a fair voluntary sale for cash. Thus the value of the improvements, the court pointed out, could not establish the value of the leasehold because at the particular time no one would pay for the leasehold, burdened as it was with lease obligations and debts, anything like the valuation of the improvements. That case illustrates very well how the state, with respect to Wherry Act leaseholds, has departed from the concept established for taxing state leaseholds or private leaseholds.

In the case of *In Re Metropolitan Building Co.*, 144 Wash. 469, 258 Pac. 473, the court pointed out, in discussing the previous *Metropolitan Building Co.* cases:

> "At the time of each assessment heretofore involved, the operation showed a net loss, now they show a profit, but of how much is seriously in dispute and presents a vital question in the present case."

The court went on to say:

> "The first of the former cases settled the law, which is still applicable. It is there said:
> " 'We are bound by the statute, therefore, to determine the value of the leasehold as personal property. In determining the worth of a leasehold the courts have universally held that it is the value of the term less the rent reserved. The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to

one who desires to sell but who is under no necessity for selling, and to one who is desirous of buying but is under no compulsion to do so. . . .

" 'This rule of value has been applied in condemnation cases, where it is necessary to determine the immediate value of leasehold property as a basis for the assessment of damages. *Corrigan v. Chicago,* 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; *In re New York & Brooklyn Bridge,* 4 N. Y. Supp. 222; *Pennsylvania R. Co. vs. Eby,* 107 Pa. St. 166. If the real property upon which the buildings are erected were owned by a private individual, we apprehend that the question raised in this case would not have occurred; for, unless controlled by the contract of the parties, the real property would be assessed to the owner of the fee, while the leasehold would be assessed to the lessee. The fact that the fee is in the people of the State of Washington does not alter the rule.

" 'The fallacy of appellant's position may be readily shown by suggesting that, in the final years of the term, if their theory be followed, respondent would pay only a nominal tax, or be burdened by a tax so onerous as to amount to confiscation. For if the assessment be made with reference to the time the lease had yet to run, the assessed value would be out of all proportion to its value. If, on the other hand, if respondent were compelled to pay upon the amount of its investment, the tax would be grossly excessive. Whereas, under the rule as we find it to be, the present worth of the lease from year to year, considering also the term, fixes a criterion of value easily ascertainable and just to both parties. Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous, and entitles respondent to relief.' "

This is far different from the criterion set by the Washington Supreme Court for Wherry Housing projects, where the value of the physical property only is considered, and is far different from the practice followed by the county assessor in this case, where the burdens were entirely disregarded. There can be no question that the trial court and the Circuit Court of Appeals were correct in finding that this Wherry Act leasehold had been taxed at a different and higher basis than other similar property in the state is taxed.

Respondent's argument that the situation should be different here because the 75 year lease would exceed the life of the improvements is not basd upon any finding of the court in this case, nor upon any evidence. The only evidence on this point comes from the request for admissions and answers thereto. Respondent sought, (R. 89) to secure an admission that the life expectancy of the buildings would not exceed 60 years. In response thereto, petitioner answered (R. 94):

> "With respect to requests 5, 6 and 7, these defendants cannot admit that the life expectancy of the buildings will not exceed 60 years, since the terms of the lease of each of these defendants provided for replacement reserves which would have resulted in maintenance of the buildings in perpetuity."

However, the Washington Supreme Court in its treatment of other leaseholds has not made any distinction as to the method of taxing those that are long or short. Thus, the *Metropolitan Building Co.* cases previously referred to were 50 year leases from the state, being substantially the life of the buildings, and it was in the case of those long term

leases that the Washington law was established to the effect that taxation must be upon the basis of the market value of the leaseholds considered in the light of its burdens and benefits.

With respect to other leases, the law of Washington is that for tax purposes, no matter how long the lease runs, it is still a leasehold and does not constitute ownership. Thus, in *State ex rel. Hellar vs. Jackson,* 82 Wash. 351, 144 Pac. 48, the Washington Supreme Court declared the law to be that even a lease for 999 years did not costitute ownership. The court said:

> "It is also argued by the relator that, inasmuch as the leases from the Northern Pacific Railway Company to the Oregon-Washington Railroad & Navigation Company and the Great Northern Railway Company extend for a period of 999 years, that these lessees, in substance, own an interest in the railway. As a matter of fact, this contention may be correct. But, as a matter of law, the lessees do not own the fee and are not owners of the road. They are simply lessees for a given time."

The point is that by the law of Washington, in taxing all leaseholds other than Wherry Housing Act leaseholds, irrespective of the length of the term, the criterion is always the same, and it is only with respect to Wherry Act leaseholds that the value of the physical improvements is taken as the value of the leasehold.

Respondent's brief undertakes to argue that there is no exemption from the state taxation because of the fact that these improvements are on federal lands. We do not make any such contention. We merely contend that in such taxation the leaseholds must be treated the same as other leaseholds

would be treated, and that the federal court should not give any aid to discriminatory taxation of a leasehold from the federal government.

Respondent cites the statutes relative to taxation in the state of Washington and makes the statement that the petitioners refused to comply with the law in regard to listing their personalty. There is nothing in the record to this effect and petitioners do not admit that there was any refusal to comply with the law.

On page 32 of respondent's brief, the argument is made that the county was brought into the condemnation proceedings by an injunction proceeding, and that this would require a three judge court. The fallacy of this argument is that the injunction proceeding instituted by the United States was not to prevent the collection of taxes but to prevent the attempted sale by the county of government property, namely the physical buildings and improvements upon a military base.

The attempted remedy, which was restrained by the government, was not an attempt to sell the *leasehold* but an attempt to sell government owned buildings (R. 133, R. 137, R. 139). The government had, at the time of issuing the restraining order, actually taken even the leasehold by declaration of taking (R. 59). This was no challenge to the constitutionality of the state law. There is no state law to the effect that government property can be sold.

This matter was actually brought before the court when Grant County petitioned the United States District Court to pay it the amount of the claimed taxes from the deposit of estimated compensation (R. 72). The County petitioned the court to direct the payment to it of an amount in excess

of the deposit of estimated compensation to the owner (R. 83). It was the application of respondent to the federal court for assistance in collecting the discriminatory taxes that initiated the portion of the proceedings which was the subject of the appeal to the Ninth Circuit Court, which resulted in petition for review by this court. It is not necessary to have any three judge court to pass upon the question of whether the federal court will assist a state in discriminating against a leasehold from the federal government.

The issue of the injunction is not before this court, and it was not before the Circuit Court of Appeals. That matter was handled by a stipulation between government counsel and counsel for respondents (R. 75), and the order granting preliminary injunction (R. 76) was entered in a proceeding in which petitioners were not even involved, and it was solely between respondent and the government. No appeal was taken from the order granting that injunction and no order under rule 54-B was entered permitting an appeal with respect to that injunction, and there is nothing before this court with respect thereto.

This court should hold the discriminatory taxes not collectible in the federal courts. It should not have the federal courts undertake to reassess or evaluate the properties, since that is a function reserved by the Washington Constitution, Article XI, Sec. 12, to the county authorities. Neither the courts, or any other agency, may usurp or exercise that function. *State ex rel State Tax Commission v. Redd,* 166 Wash. 132, 6 P(2d) 619.

CONCLUSIONS

The state of Washington has undertaken to tax these leaseholds from the federal government on a basis different and higher than when it taxes leaseholds from the state or from private individuals. The federal courts should not lend their assistance to discriminatory treatment of federal leaseholds.

Respectfully submitted,

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